Filed 9/28/09 P. v. White CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. ALAN JACK WHITE, Defendant and Appellant.	C059220 (Super. Ct. No. 07F01893)

A jury convicted defendant Alan Jack White of attempted murder (Pen. Code, §§ 664/187, subd. (a); undesignated section references are to the Penal Code; count one) and corporal injury upon a cohabitant (§ 273.5, subd. (a); count two). In connection with both counts, the jury found the allegation that defendant personally inflicted great bodily injury (§ 12022.7, subd. (e)) to be true.

Sentenced to state prison, defendant appeals. He contends (1) insufficient evidence supports his conviction for attempted murder and (2) the trial court erroneously admitted propensity evidence. We will affirm the judgment.

FACTS

The victim dated defendant for a short period of time and then moved into his home. Prior to their relationship, the victim had attempted suicide about which she told defendant. She continued having thoughts of suicide while dating defendant. Their relationship was troubled; they often argued; and the victim was afraid to leave defendant. To release her emotions, the victim engaged in cutting behavior.

In the morning on February 22, 2007, defendant and the victim argued. Defendant threatened to drive his truck off the Auburn Bridge. The victim wrote defendant a note to end the relationship, stating that she was "'tired of hurting'" him and that he "'deserve[d] better.'" She ended the note, "'See you in another life.'"

In the afternoon the same day, defendant and the victim went to Jim Boys Taco. After eating, they argued in the truck. The victim explained that she had tried to pay but the restaurant did not take credit cards. Defendant became angry because he had to pay. Then, when he finished all but one taco, he tried to get a box but could not find an employee so he went to the truck. When the victim went to the truck, he asked her where his box was. She did not think he wanted one. He went back inside and came back out with his taco.

He said she was a "'b[----]'" and "'nothing'" because she did not get him a box for his taco.

The argument ensued from there.

While defendant was driving, he threw the taco in the victim's face. He became more angry and drove the truck back and forth across the lanes in the road numerous times. He hit the victim several times in the face. The victim pleaded with him to stop the truck and to stop hitting her. She was not wearing her seatbelt and when she tried to put it on, he grabbed her. She did not recall telling an officer later that defendant kept slapping her hand away from the seat belt lock. According to the victim at trial, defendant then said, "'If you really want to die, b[----], then I'll f[------] kill you.'" The victim recalled telling the officer later that defendant stated, "'Bitch you want to die? I will kill you. F[---] you. Die now.'" Defendant then turned the wheel sharply to the right, accelerated, crashed through a wooden fence, crossed a yard, crashed through a second wooden fence, and smashed into a 40 foot redwood tree. Upon regaining consciousness, the victim was choking on her own blood. Defendant told her that they needed to get their stories straight as to what happened.

Defendant called the victim's mother on a cell phone, informing her that there had been a crash, and that the victim was injured and was being taken to the hospital. Defendant apologized, saying that he crashed the truck "on purpose in order to teach [the victim] a lesson." The victim's mother told defendant that he needed to attend anger management classes.

At the scene, defendant told an officer that he had been arguing with the victim and had not been "paying a whole lot of attention to the road." Defendant said that when the victim

"started to shake," "the next thing" he knew he was "driving through a fence." The officer asked if the victim had grabbed the steering wheel, defendant answered, "No, I don't believe so." The officer observed no signs of fresh braking.

At the hospital, the victim told a doctor that defendant tried to kill her. She was hospitalized for five days. The victim suffered a broken jaw, (potentially a life-threatening injury) severe whiplash, and bruising on her shoulder and face. Metal plates were inserted in her jaw, which was wired shut for eight weeks. She had been in the hospital four times as a result of her injuries.

The prosecution presented evidence of a prior domestic violence act involving the defendant's former spouse. In 2005, defendant and the former spouse argued. When he smashed her cell phone, she threw his computer. When she went into the garage, defendant followed and shoved her to the floor. He held a leaf blower over head but she moved in time to avoid it when he dropped it. She went into the living room and he followed. He pushed her over the couch and choked her. She broke free and defendant kicked her very hard in the chest. She fell backwards and defendant choked her again. The former spouse suffered welts and scrapes.

Defendant testified. He claimed that the 2005 argument with his former spouse was a "pushing match."

With respect to the current offenses, defendant explained that the victim had overdosed on her medication, cut her arms and legs, and said she was going to kill herself, all within a

few days prior to the accident. The day of the accident, defendant received the victim's note which he interpreted as meaning that she was going to hurt herself again or kill herself. He found her walking up the street and had her return to his home while he ran errands. In the afternoon, they went to a Jim Boys Taco where he became angry because he had to pay, could not find an employee to get a box to put his leftovers in, and the victim did not bring his food with her when she finished hers. They argued in the truck first about the lunch bill and then about their relationship. She threatened to kill herself and moved her hands towards him. He swerved from lane to lane when he deflected her hands. When he swerved to avoid a tree in the median, the truck went out of control even though he tried to brake. He was headed towards a pole and swerved. He went through a fence and the victim, who was not wearing a seatbelt (which he knew) hit the dashboard. He eventually hit a tree. His seatbelt was on and his air bag deployed. He got out and helped the victim from the floorboard to her seat. When the officer asked if the victim had grabbed the steering wheel, defendant claimed he responded, "'Yes. No. I don't know.'" He called the victim's mother and said he was sorry for arguing with the victim, which he believed led to the accident. He agreed to anger management classes when asked.

DISCUSSION

I

Defendant claims insufficient evidence supports his conviction for attempted murder, specifically, the jury's

conclusion that he entertained the specific intent to kill. We disagree.

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence--that is, evidence that is reasonable, credible, and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11 (*Rodriguez*).) "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt. '"If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment."' [Citations.]" (*People v. Bean* (1988) 46 Cal.3d 919, 932-933.)

"Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." (*People v. Lee* (2003) 31 Cal.4th 613, 623; *People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690.) An intent to kill is rarely shown by direct evidence; such intent may be inferred from defendant's acts and

the underlying circumstances. (*People v. Smith* (2005) 37 Cal.4th 733, 741 (*Smith*).)

There is more than sufficient evidence of intent. Here, there is direct evidence that defendant intended to kill the victim. He declared to the victim: "'B[----] you want to die? I will kill you. F[---] you. Die now.'" Moreover, defendant's intent to kill may be inferred. His action of sharply turning and accelerating through two fences and a yard and crashing into a huge tree, knowing that the victim was not wearing a seatbelt and slapping her hands away from the seatbelt lock, reflected his desire that death would result for the victim or that he knew to a substantial certainty death would result for the victim. (*Smith, supra,* 37 Cal.4th at p. 739.)

Defendant's reliance upon *People v. Belton* (1980) 105 Cal.App.3d 376 is misplaced. In finding insufficient evidence of attempted murder, *Belton* stated: "[T]here is a dearth of evidence to establish that defendant set the fires with an intent to murder Mrs. Belton. There were neither threats of personal injury, vows of vengeance, conversations about contemplated personal violence, or earlier attempts at murder. As noted above, specific intent to murder cannot be presumed merely from the defendant's setting fire to an inhabited building." (*Id.* at p. 381.) In rejecting the People's reliance upon a prior domestic disturbance, *Belton* stated: "We think any deduction of murderous intent from a quarrel three months earlier is entirely speculative and conjectural. On the night of the fires the parties spent the day drinking together in

reasonable tranquility. No threats or talk of arson had been advanced, then or earlier. Nothing in the evidence supports an inference that in starting these fires defendant wanted to murder anyone. It would be equally plausible to speculate that he started the fires to impoverish his ex-wife by destroying her property, or, as suggested by some of the evidence, that he wanted the apartment building modernized and rebuilt at the insurance company's expense (which in fact happened)." (*Id.* at p. 380.)

Here, defendant's abuse of the victim began at the restaurant. Already angry because he had to pay for the food, he berated the victim when she did not get him a box for his leftovers. While he was driving, he abused her by throwing the taco in her face. His physical abuse continued when he hit her several times in the face. He endangered her life when he swerved back and forth across the lanes in the road numerous times. Finally, he accelerated through fences and yards, crashing into a tree. While he had on his seatbelt and an airbag deployed, he knew that the victim did not have her seatbelt on and he either grabbed her or slapped her hand away when she tried to put it on. Unlike *Belton*, defendant here stated his intent to kill the victim and everything else in the evidence supported an inference that he wanted to murder the victim.

Defendant relies upon *People v. Ratliff* (1986) 41 Cal.3d 675 (*Ratliff*) and *People v. Johnson* (1981) 30 Cal.3d 444 (*Johnson*) for the proposition that a defendant's act of shooting

a victim at close range did not conclusively show an intent to kill. Both cases involved instructional error. In *Ratliff*, the trial court failed to instruct the jury that the specific intent to kill was required for attempted murder and that the implied malice instructions did not apply to the attempted murder charge. (*Ratliff, supra,* 41 Cal.3d at p. 695.) Although the defendant intended to shoot, there was no additional evidence of a specific intent to kill so the instructional error was prejudicial. (*Id.* at p. 695-696.) In *Johnson*, the trial court erred in instructing the jury that implied malice may support assault with intent to commit murder. (*Johnson, supra,* 30 Cal.3d at pp. 447-448.) Noting that the defense was self-defense, *Johnson* reversed the conviction, concluding that the jury could have found implied malice and convicted the defendant without finding express malice. (*Id.* at p. 449.)

Neither *Ratliff* nor *Johnson* supports defendant's claim here of insufficient evidence. Defendant likewise misplaces his reliance upon *People v. Venegas* (2004) 115 Cal.App.4th 592, which found that the trial court's error in instructing that any violation of the basic speed law suffices for the implied malice requirement of second degree murder constituted an improper mandatory presumption and was prejudicial. (*Id.* at pp. 598-605.) Here, the jury was correctly instructed that attempted murder required the jury to find that defendant intended to kill the victim.

Defendant suggests that an attempted murder conviction cannot be sustained based on defendant's culpability in his use

of his vehicle. Defendant cites *People v. Watson* (1981) 30 Cal.3d 290 for the proposition that a "[s]pecific intent to kill cannot be presumed from reckless driving even when it appears to be done with conscious disregard for life." *Watson* is of no assistance to defendant. *Watson* considered whether the trial court properly dismissed second degree murder charges against the defendant who killed two people in a drunk driving accident. The defendant was also charged with two counts of vehicular manslaughter. *Watson* concluded that the facts supported a finding of implied malice and reversed the dismissal of the second degree murder charges. (*Id.* at pp. 293-300.) Here, defendant was charged with attempted murder. That he used a vehicle rather than a gun, knife, or other instrument matters not because the manner in which he used the vehicle and his intent to murder the victim supported his conviction for attempted murder. Sufficient evidence supports defendant's conviction for attempted murder.

II

Defendant contends Evidence Code section 1109 violates the requirements of due process as applied because it rendered his trial fundamentally unfair as to the corporal injury offense only. As he acknowledges, several courts, following the reasoning of *People v. Falsetta* (1999) 21 Cal.4th 903 (*Falsetta*) in upholding Evidence Code section 1108, have uniformly rejected federal and state constitutional facial due process claims. (See, e.g., *People v. Reyes* (2008) 160 Cal.App.4th 246, 251; *People v. Price* (2004) 120 Cal.App.4th 224, 240; *People v.*

Escobar (2000) 82 Cal.App.4th 1085, 1095-1096; *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1026-1029; *People v. Johnson* (2000) 77 Cal.App.4th 410, 416-420 (*Johnson II*) [opinion of this court].) We likewise reject defendant's claim here. Defendant argues the trial court abused its discretion in admitting the evidence of the prior domestic violence act against his former spouse. We disagree.

Defendant moved to exclude and the prosecutor moved to admit the December 2005 incident of defendant's prior domestic violence act against his former spouse when he choked, punched, and kicked her in their home they shared with their three-year-old child. They had been arguing about defendant's drug use.

Defense counsel objected to the admission of the alleged incident. Defense counsel argued that the prior incident and the current offense were dissimilar and showed mutual combat at most; although defendant was arrested, he was released and no charges were filed; defendant's drug usage was not relevant; and there was a lack of foundation.

The trial court stated on the record that although there was a lack of similarity, the incident was more probative than prejudicial and admissible except for certain facts, that is, defendant's drug use, the presence of their child, and defendant's arrest.

Defendant's former spouse testified about the act that the trial court had ruled admissible. The court instructed the jury with respect to the use of propensity evidence.

In deciding whether to admit domestic violence evidence under Evidence Code sections 1109 and 352, the trial court "must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as . . . excluding irrelevant though inflammatory details surrounding the offense." (*Falsetta, supra,* 21 Cal.4th at p. 917 [Evid. Code, § 1108]; *Johnson II, supra,* 77 Cal.App.4th at p. 417 [applying *Falsetta* to Evidence Code section 1109 "since the two statutes are virtually identical"].) We review a trial court's ruling to admit evidence under Evidence Code section 352 for abuse of discretion. (*Rodriguez, supra,* 20 Cal.4th at pp. 9-10.)

Defendant asserts the trial court abused its discretion in admitting this evidence "because without it, it was reasonably probable that the jury would have found the domestic violence conviction (count 2) was based on conduct amounting to an accident." Having found sufficient evidence of attempted murder, there is no reasonable probability of any such thing. The trial court considered the nature of the prior domestic violence act. Although dissimilar in the manner in which defendant inflicted abuse, the prior was quite probative of defendant's propensity to do so. The trial court, exercising

its discretion, excluded irrelevant details, that is, defendant's drug use, the presence of their child, and defendant's arrest. We find no abuse of discretion.

DISPOSITION

The judgment is affirmed.

SIMS, Acting P. J.

We concur:

NICHOLSON, J.

CANTIL-SAKAUYE, J.